4-18-1963

Castaneda v. Superior Court of Los Angeles County

Roger J. Traynor

[L. A. No. 27150. In Bank. Apr. 18, 1963.]

HENRY CASTANEDA, Petitioner v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

[1] **Searches and Seizures—Incidental to Arrest—Search of Premises.**—Though there was reasonable cause to arrest an accused without a warrant, a search of his home was not justified as incidental to his arrest where it was at a distance from the place of his arrest and was not contemporaneous therewith.

[2] **Id.—Consent.**—To protect his right to object to an unreasonable search or seizure, a defendant need not forcibly resist an officer's assertion of authority to enter his home or search it or his person, but if he freely consents to entry or search, or voluntarily produces evidence against himself, his constitutional rights are not violated and any search or taking of evidence pursuant to his consent is not unreasonable.

[3] **Id.—Consent.**—Whether in a particular case an apparent consent to search or seizure was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact to be determined in the light of all the circumstances.

[4] **Id. — Consent.** — Although not conclusive in determining whether consent to a search and seizure has been given, a circumstance of particular significance is a defendant's custody at the time of the request for his permission to search; where he has submitted to arrest, or is in jail, he knows that he is virtually powerless to prevent the search.

[5] **Id.—Consent.**—The prosecution failed to discharge its burden of showing that an accused consented to a search of his home where it appeared that the accused was not only under arrest at the time of the alleged consent, but was also handcuffed at all times until he was finally taken to jail several hours after his arrest, and had no choice but to go wherever the officers took him, where he knew that the officers wished to search his home and that if they did they would find evidence against him,

[1] See **Cal.Jur.2d**, Searches and Seizures, § 49; **Am.Jur.**, Searches and Seizures (1st ed § 16).

[2] See **Cal.Jur.2d**, Searches and Seizures, § 40; **Am.Jur.**, Searches and Seizures (1st ed § 71).

McK. Dig. References: [1] Searches and Seizures, § 29; [2-5] Searches and Seizures, § 22; [6] Searches and Seizures, § 11.

and where he repeatedly attempted to lead the officers away from his house, and after such efforts failed, he was neither asked to nor did he express his consent that the search continue; such efforts by the accused made it clear that he did not freely and voluntarily consent to the search of his home.

[6] **Id.—Search Warrants—Determination of Necessity for.**—Where a search of an accused's home was neither consented to nor incident to his arrest, but was at a distance therefrom and not contemporaneous therewith, he had the right to have a magistrate determine whether there was reasonable cause to search his home and whether a search warrant should therefore issue.

PROCEEDING in prohibition to prevent the Superior Court of Los Angeles County and Herbert V. Walker, Judge thereof, from trying petitioner on a criminal charge. Peremptory writ granted.

Frank C. Wood, Jr., for Petitioner.

No appearance for Respondent.

William B. McKesson, District Attorney, Harry Wood, Robert J. Lord and Harry B. Sondheim, Deputy District Attorneys for Real Party in Interest.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, and Gordon Ringer, Deputy Attorney General, as Amici Curiae on behalf of Real Party in Interest.

TRAYNOR, J.—By information petitioner was charged with possession of heroin in violation of Health and Safety Code, section 11500. His motion to set aside the information on the ground that the evidence against him was obtained by an illegal search and seizure was denied, and he now seeks prohibition to prevent his trial. (See *Badillo* v. *Superior Court*, 46 Cal.2d 269, 271 [294 P.2d 23].)

Evidence was presented at the preliminary hearing of the following facts: On November 21, 1961, Deputy Sheriff Copping of the narcotics detail of the Los Angeles sheriff's office and three other officers went to John Spade's house in Lynwood. They had no arrest or search warrant. Deputy Copping knew that Spade was a narcotics addict and had received information of narcotics traffic at his house. The of-

ficers arrived about 7:30 p.m. and put the house under surveillance. About 7:45 p.m. someone arrived in a car, entered the house, stayed about 15 minutes, and then drove away. About 8:30 p.m. two people arrived in a car, parked in the driveway, and entered the house. About 9 p.m. one officer went to the front door, another officer went to the back door, and Deputy Copping and the fourth officer went to the kitchen door at the side of the house. Through an open window, Deputy Copping saw Spade standing in the kitchen. His left sleeve was rolled up, and he had an eyedropper and hypodermic needle in his right hand. He concluded that Spade had just finished or was taking an injection of narcotics. While Deputy Copping was waiting for the other officers to get set, Spade opened the door, and Deputy Copping arrested him and entered the kitchen. Petitioner and a third person, Trejo, were present. From their appearance and behavior, Deputy Copping concluded that they were under the influence of narcotics. While the other officers stayed in the kitchen with petitioner and Trejo, Deputy Copping took Spade into another room. Spade told him that the heroin had all been shot up and that he had put the narcotics outfit back under the sink, where the officers found it. They arrested Spade, Trejo, and petitioner. Deputy Copping knew petitioner as a person who had been named by several addicts as their source of narcotics, and he had participated in the surveillance of petitioner's house over a period of several months.

The officers handcuffed petitioner before leaving Spade's house, and Deputy Copping asked him if he had any more narcotics at his house. He said he did not. "I asked him if we could look, and he asked me if I had a search warrant. I stated I did not have a search warrant, and I would not need one if he would give me consent, at which time he gave me consent. Q. What did he say? A. He said you could go ahead and look." Deputy Copping and one of the other officers took petitioner with them in their car and started toward his house at 305 West Bennett in Compton. Deputy Copping asked petitioner where he lived; and petitioner said that he lived at 1430 Tamarind Street in Compton. He was asked if he was sure, and then said "All right. You guys know where I live." When they arrived at 305 West Bennett, petitioner said, "I don't live here; I live over here," and pointed to 303 West Bennett. He knocked on the door, and his aunt let

him and the officers in. The officers asked petitioner's aunt if he lived there and she said, "No, he lives across the way." Petitioner said, "Mary, don't tell them nothing. Mary, don't tell them nothing."

The officers took defendant from 303 to 305 West Bennett, where a young girl was sitting with petitioner's four minor children. She told the officers that petitioner lived there. They asked petitioner again if he had any narcotics in the house, and he said, "All right, I will tell you where they are." Petitioner directed the officers to his mother's house at 1413 Tamarind Street and told them that there were narcotics on a rafter in the garage. The officers looked and found nothing. They then took petitioner back to 305 West Bennett and searched the house in his presence. They discovered a quantity of heroin, which was admitted in evidence at the preliminary hearing over objection to establish the corpus delicti of the crime charged.

[1] Although it is not disputed that the officers had reasonable cause to arrest petitioner without a warrant when they discovered him at Spade's house, the search of petitioner's home cannot be justified as incidental to his arrest, "for it was at a distance from the place thereof and was not contemporaneous therewith. [Citations.]" (*People* v. *Gorg,* 45 Cal.2d 776, 781 [271 P.2d 469]; *Tompkins* v. *Superior Court, ante,* pp. 65, 67 [27 Cal.Rptr. 889, 378 P.2d 113].)

The People contend, however, that the evidence is sufficient to support the committing magistrate's implied finding that petitioner freely consented to the search of his home. [2] In *People* v. *Michael,* 45 Cal.2d 751, 753 [290 P.2d 852], we stated: "To protect his right to object to an unreasonable search or seizure a defendant need not forcibly resist an officer's assertion of authority to enter his home or search it or his person [citations], but if he freely consents to an entry or search, or voluntarily produces evidence against himself, his constitutional rights are not violated and any search or taking of evidence pursuant to his consent is not unreasonable. [Citations.] [3] Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." (See also *People* v. *Burke,* 47 Cal.2d 45, 49 [301 P. 2d 241].) In the present case the testimony of Deputy Copping dispels any inference that might otherwise have been

drawn from petitioner's words of consent that he freely and voluntarily consented to the search of his home.

[4] Although not conclusive, "A circumstance of particular significance is a defendant's custody at the time of the request for his permission to search, for where he has submitted to arrest, or is in jail, he knows that he is virtually powerless to prevent the search. [Citations.]" (*People* v. *Gorg,* 45 Cal.2d 776, 782, fn. 2 [291 P.2d 469].) [5] In the present case, petitioner was not only under arrest, but he was handcuffed at all times until he was finally taken to jail several hours after his arrest, and he had no choice but to go wherever the officers took him. He knew that the officers wished to search his home and that if they did so they would find evidence against him. He repeatedly attempted to lead the officers away from his home, and after these efforts failed, he was neither asked to nor did he express his consent that the search continue. These efforts make abundantly clear that petitioner did not freely and voluntarily consent to the search of his home. The most that can be inferred is that petitioner sought to placate the officers and hoped that by agreeing to the search of other premises, he would forestall the search of his home and the discovery of incriminating evidence. We do not condone petitioner's efforts to mislead the officers. [6] It bears emphasis, however, that petitioner was under no duty to assist the officers in securing evidence against him. Since the search was not incident to his arrest, he had the right to have a magistrate determine whether there was reasonable cause to search his home and whether a search warrant should therefore issue. (*Chapman* v. *United States,* 365 U.S. 610, 613-616 [81 S.Ct. 776, 5 L.Ed.2d 828, 831-833]; *Johnson* v. *United States,* 333 U.S. 10, 13-15 [68 S.Ct. 367, 92 L.Ed. 436, 439-440]; *Agnello* v. *United States,* 269 U.S. 20, 32-33 [46 S.Ct. 4, 70 L.Ed. 145, 148-149, 51 A.L.R. 409, 413-414].) "'Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.'" (*People* v. *Tarantino,* 45 Cal.2d 590, 594 [290 P.2d 505], quoting *McDonald* v. *United States,* 335 U.S. 451, 455 [69 S.Ct. 191,

93 L.Ed. 153, 158].) Petitioner did not forfeit that right by his efforts to mislead the officers. At the preliminary hearing the burden was on the prosecution to present substantial evidence of consent to the search (*Badillo* v. *Superior Court*, 46 Cal.2d 269, 272 [294 P.2d 23]), and it failed to discharge that burden.

Let the peremptory writ issue as prayed.

Gibson, C. J., Peters, J., Tobriner, J., and Peek, J., concurred.

SCHAUER, J., Dissenting—On the facts which are shown to have been known to the arresting officers I am of the view that the search was justified. The justifying facts appear to include the following items: (1) the criminal conduct of the petitioner's companions immediately preceding his arrest; (2) the behavior of petitioner himself at that time and following his arrest; (3) the information which the officers had that petitioner was an established trafficker in illegal narcotics; (4) the inferences that petitioner had supplied the drug which Spade had injected, and that as a regular supplier petitioner would have cached away a further stock of the contraband. These are inferences which, I think, officers experienced and skilled in detecting and apprehending suppliers of illegal narcotics would properly have drawn from the above related probative facts.

Furthermore, I think it should occur to the officers that this petitioner would probably have an accomplice who, promptly following petitioner's arrest (and disappearance of the law enforcement officers), would remove and secrete or destroy any contraband which might otherwise be found in petitioner's home, or in any other place which might be conveniently available to him. Accordingly, such officers would deem it to be only diligent discharge of duty to immediately pursue the clues before them. This they did, expeditiously, intelligently and successfully.

For the reasons indicated I would discharge the alternative, and deny the peremptory, writ of prohibition.

McComb, J., concurred.

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[Crim. No. 7295. In Bank. Apr. 18, 1963.]

THE PEOPLE, Plaintiff and Appellant, v. CURTIS RAY MICKELSON, Defendant and Respondent.

[1a, 1b] **Searches and Seizures—Investigations Falling Short of Search.**—The rule that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the street for questioning does not conflict with U.S. Const., 4th Amend., forbidding unreasonable searches and seizures, but strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement, and wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified.

[2] **Id.—Validity of Police Procedure.**—A state rule governing police procedure with respect to searches and seizures is not unconstitutional merely because it permits conduct in which a federal officer may not lawfully engage.

[3] **Id.—Validity of Police Procedure.**—Before a state rule governing police conduct with respect to searches and seizures may be struck down, it must appear that neither Congress nor a state legislature could authorize it; if a state adopts rules of police conduct consistent with the requirements of U.S. Const., 4th Amend., forbidding unreasonable searches and seizures, and if its officers follow those rules, they do not act unreasonably within the meaning of the amendment although different rules may govern federal officers.

[4] **Id.—Search of Vehicles—Reasonable Cause.**—Although it was not unreasonable for a police officer to stop an automobile for investigation and to take reasonable precautions for his own safety in view of the fact that the driver's description was similar to the description, previously given to the officer, of the robber of a market, a search of the automobile which turned up evidence connecting a passenger in the vehicle to burglaries of telephone booths exceeded the bounds of reasonable investigation and was not justified by probable

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[1] See **Cal.Jur.2d**, Searches and Seizures, § 31.

[4] Search of automobile without warrant by officers relying on description of persons suspected of a crime, note, 60 **A.L.R.** 299. See also **Cal.Jur.2d**, Searches and Seizures, § 43; **Am.Jur.**, Searches and Seizures (1st ed § 18).

McK. Dig. References: [1] Searches and Seizures, § 6; [2, 3] Searches and Seizures, § 1; [4] Searches and Seizures, § 31.

cause to make an arrest where there could have been more than one person abroad at night who fitted the description of the market robber, where the driver, though in the vicinity of the robbery, was not observed until about 20 minutes after it occurred when he was driving toward the scene of the crime, not away from it, where the officer's investigation elicited identification on request and a story consistent with the automobile's movements and the officer's own assessment of those movements, and where the occupants of the car were out of the car and away from any weapons that might have been concealed therein.

APPEAL from an order of the Superior Court of Los Angeles County setting aside an information. Walter R. Evans, Judge.* Affirmed.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, William B. McKesson, District Attorney, Harry Wood and Harry Sondheim, Deputy District Attorneys, for Plaintiff and Appellant.

Gladys Towles Root, Eugene V. McPherson and Philip C. Greenwald for Defendant and Respondent.

TRAYNOR, J.—Defendant was charged in two counts of an information with committing burglaries of telephone booths, in violation of Penal Code, section 459. His motion to set aside the information was granted (Pen. Code, § 995), and the People appeal. The Attorney General concedes that there was no evidence at the preliminary hearing to support count I and seeks a reversal only as to count II.

A Burbank police officer discovered the physical evidence supporting count II in the course of searching an overnight bag found under the front seat of an automobile in which defendant had been riding and which Don Zauzig had been driving. The bag contained $85.90 in nickels, dimes, and quarters. At defendant's preliminary hearing, the bag and its contents were introduced in evidence, and Zauzig testified to his and defendant's commission of the burglary. Zausig's arrest and his availability as a witness were direct results of the search that disclosed the physical evidence of the burglary. If that search was illegal, neither the physical evidence nor Zauzig's testimony is competent to support the information.

*Assigned by Chairman of Judicial Council.

(*Silverthorne Lbr. Co.* v. *United States,* 251 U.S. 385, 392 [40 S.Ct. 182, 64 L.Ed. 319, 321, 24 A.L.R. 1426, 1428]; *Weiss* v. *United States,* 308 U.S. 321, 330-331 [60 S.Ct. 269, 84 L.Ed. 298, 303]; *Nardone* v. *United States,* 308 U.S. 338, 341 [60 S.Ct. 266, 84 L.Ed. 307, 311-312]; *Wong Sun* v. *United States,* 371 U.S. 471 [83 S.Ct. 407, 417, 9 L.Ed.2d 441]; *People* v. *Berger,* 44 Cal.2d 459, 462 [282 P.2d 509]; *People* v. *Dixon,* 46 Cal.2d 456, 458 [296 P.2d 557]; *People* v. *Schaumloffel,* 53 Cal.2d 96, 101-102 [346 P.2d 393]; *People* v. *Ditson,* 57 Cal.2d 415, 439 [20 Cal.Rptr. 165, 369 P.2d 714].)

The Attorney General contends, however, that the arresting officer had reasonable cause to arrest Zauzig for a recent robbery in the neighborhood and that the search of the car was therefore justified as incidental to the arrest. Before the decision of the United States Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081], we were free to determine such an issue under the California decisions setting forth the rules governing police investigations and arrests. In view of the holding in that case that the Fourteenth Amendment requires state courts to exclude unconstitutionally obtained evidence, we must determine at the outset whether the federal rules governing police investigations and arrests have superseded our own. There are significant differences between the respective rules that are relevant to this case.

In *Henry* v. *United States,* 361 U.S. 98, 103 [80 S.Ct. 168, 4 L.Ed.2d 134, 139], the United States Supreme Court held that an arrest occurs when an automobile is stopped during the course of a criminal investigation, and if the officer does not have reasonable cause to arrest the occupant at that time, the arrest is unlawful. Anything the officer learns as a result of stopping the automobile is inadmissible in evidence and cannot justify a search. (See also *Brinegar* v. *United States,* 338 U.S. 160, 166 [69 S.Ct. 1302, 93 L.Ed. 1879, 1885]; *Rios* v. *United States,* 364 U.S. 253, 261-262 [80 S.Ct. 1431, 4 L.Ed.2d 1688, 1693-1694].) **[1a]** In this state, however, we have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make an arrest, the

officer may arrest the suspect and conduct a reasonable incidental search. (*People* v. *Simon*, 45 Cal.2d 645, 650 [290 P.2d 531]; *People* v. *Martin*, 46 Cal.2d 106, 108 [293 P.2d 52]; *People* v. *Blodgett*, 46 Cal.2d 114, 117 [293 P.2d 57]; *People* v. *Beverly*, 200 Cal.App.2d 119, 125 [19 Cal.Rptr. 67]; *People* v. *King*, 175 Cal.App.2d 386, 390 [346 P.2d 235]; *People* v. *Anushevitz*, 183 Cal.App.2d 752, 755 [6 Cal. Rptr. 785].)

The *Mapp* case did not determine whether or not the states must follow all the federal rules. Neither did *Elkins* v. *United States*, 364 U.S. 206 [80 S.Ct. 1437, 1453, 4 L.Ed.2d 1669], which on this matter held only that the conduct of state officers would be measured against the federal rules when state-secured evidence was offered in federal prosecutions.

[2] A state rule governing police procedure is not unconstitutional merely because it permits conduct in which a federal officer may not lawfully engage. The Fourth Amendment[1] itself sets forth no more than the basic outlines of lawful law enforcement. It becomes meaningful in specific situations only by reference to the common law and statutory law governing the issuance of warrants, the authority of officers, and the power to arrest. Illegally obtained evidence may be excluded by the federal courts for various reasons. It may be excluded because it was obtained in a way that could not constitutionally be authorized. It may be excluded because it was obtained in violation of a federal statute or a common-law rule or a state rule applicable to federal officers. It may be excluded by virtue of the Supreme Court's monitorship of the federal administration of criminal justice. (Fed. R. Crim. Proc., 3, 4, 26, 41; 18 U.S.C. App., pp. 3407-3452 (1958).)

The United States Supreme Court has not interpreted the Fourth Amendment as requiring that court to day down as a matter of constitutional law precise rules of police conduct. Indeed, its rule allowing a search by a federal officer without a warrant as incident to a lawful arrest permits reference to state law to determine the validity of the arrest. (*Johnson* v. *United States*, 333 U.S. 10, 15 [68 S.Ct. 367, 92 L.Ed. 436,

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

441]; *United States* v. *Di Re*, 332 U.S. 581, 589 [68 S.Ct. 222, 92 L.Ed. 210, 217].) **[3]** Accordingly, before a state rule governing police conduct may be struck down, it must appear that neither Congress nor a state legislature could authorize it. If a state adopts rules of police conduct consistent with the requirements of the Fourth Amendment and if its officers follow those rules, they do not act unreasonably within the meaning of the amendment although different rules may govern federal officers.

[1b] We do not believe that our rule permitting temporary detention for questioning conflicts with the Fourth Amendment. It strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified. (See Barrett, *Personal Rights, Property Rights, and The Fourth Amendment*, 1960 Sup.Ct. Rev. 46, 65-66, 69-70.)

The United States Supreme Court apparently concluded that the situations presented in the Henry, Rios, and Brinegar cases allowed no middle ground (see dissenting opinion of Jackson, J. in *Brinegar* v. *United States*, 338 U.S. 160, 183 [69 S.Ct. 1302, 93 L.Ed. 1879, 1894]), and hence that the officers were not justified in stopping the defendants' automobiles unless they had probable cause to make arrests. It does not follow that its conclusion was constitutionally compelled. Given the absence of legislation, the court had to articulate the governing rule and enforce compliance with it. It did not thereby foreclose Congress or the states from articulating other reasonable rules consistent with the Fourth Amendment.

[4] It remains to determine whether the search in this case complied with the rules of this state. The arresting officer testified that he arrested defendant and Zauzig shortly before 2 a.m. about 20 minutes after he had gone to a market on San Fernando Road where a robbery had just been reported. He was told by other officers at the market that the robber was a fairly tall white man of large build with dark hair who was wearing a red sweater and armed with a .45 automatic. The officer searched the area on foot for about 10 minutes and then returned to his car to search a wider area. While driving west on Providencia about six blocks from the market he saw a station wagon coming toward him with two

persons in it. The driver appeared to be a large white man with dark hair wearing a red sweater or jacket. The officer saw the station wagon turn south on San Fernando toward the market, and he turned south into an alley and then west at the next street. He then saw the station wagon turn west from San Fernando on the same street and followed it. The station wagon went to the end of the street where it came to a deadend, made a U-turn, and proceeded back toward San Fernando. The officer circled a block to his right and turned south on San Fernando. He was then a block or two behind the station wagon, which was traveling south on San Fernando at about 25 or 30 miles per hour. The officer overtook the station wagon and observed the passenger "bend forward in the seat, forward and down and raise back up." He turned on his red light, the station wagon pulled over and stopped, and the officer parked behind it. He radioed his location to headquarters and requested a backup car for assistance. Meanwhile Zauzig got out of the driver's seat of the station wagon and walked to the officer's car. The officer asked Zauzig where he was going, and Zauzig told him he was going home to Glendale, that he was more or less lost, and had been driving up and down sidestreets looking for the freeway. He showed the officer his driver's license. The assisting officers arrived, and the officers and Zauzig walked to the station wagon. Defendant was sitting in the right front seat and got out on request. The arresting officer looked under the right front seat and on the floorboards and saw an overnight bag stuffed under the right front seat. He pulled it out, unzipped it, and saw four screw drivers, a flashlight, a pair of canvas gloves and two socks. One sock was knotted at the top and was filled with something that jingled. When he took the bag out of the car, the officer asked Zauzig what it was, and Zauzig told him that it was his basketball equipment. The officer asked what was in the sock, and Zauzig told him that he had some dimes. The officer opened the sock and found nickels, dimes, and quarters. He arrested Zauzig and defendant on suspicion of burglary. The officer also testified that there was nothing in his conversation with Zauzig that would indicate that he had perpetrated a robbery other than that he acted a bit friendly. The movements of the car were such that it was obvious that the occupants were either trying to evade the officer or were confused and did not know the area very well. His purpose in examining the bag was the "possibility of a gun being there." After he

had talked to Zauzig and defendant he was satisfied that they had not been involved in the robbery.

It was not unreasonable for the officer to stop Zauzig's car for investigation and to take reasonable precautions for his own safety. He did not have probable cause, however, to arrest Zauzig for robbery. There could have been more than one tall white man with dark hair wearing a red sweater abroad at night in such a metropolitan area. Although Zauzig was in the vicinity of the robbery, he was not observed until about 20 minutes after it occurred when he was driving toward the scene of the crime, not away from it. The officer had no information that the robber had an automobile or a confederate. The erratic route of the car and defendant's movement in the seat were at most suspicious circumstances. The officer's investigation elicited identification upon request and a story consistent with the movements of the car and the officer's own assessment of those movements. Both occupants were out of the car away from any weapons that might have been concealed therein. Instead of interrogating Zauzig and defendant with respect to the robbery or requesting them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation. It was not justified by probable cause to make an arrest, and it cannot be justified by what it turned up. (*People* v. *Brown*, 45 Cal.2d 640, 643-644 [290 P.2d 528].)

The order is affirmed.

Gibson, C. J., Schauer, J., Tobriner, J., and Peek, J., concurred.

PETERS, J.—I concur.

I agree that the search here involved was illegal, both under state and federal law. Therefore, I agree that the order appealed from must be affirmed. But, in my opinion, such holding makes it unnecessary to discuss the scope and impact on state law of the decision of *Mapp* v. *Ohio*, 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081]. In my opinion the determination of that important constitutional question should be left to a case where it is directly involved.

McCOMB, J.—I dissent. I would reverse the order of the trial court as to count II and affirm the order as to count I,

for the reasons expressed by Mr. Presiding Justice Fox in the opinion prepared by him for the District Court of Appeal in *People* v. *Mickelson* (Cal.App.) 26 Cal.Rptr. 152.

Appellant's petition for a rehearing was denied May 14, 1963. McComb, J., was of the opinion that the petition should be granted.